Nishimatsu Construction Co Ltd v Kecom Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO J-02–519 OF 2008
GOPAL SRI RAM, HASAN LAH AND VINCENT NG JJCA
22 JULY 2008

Civil Procedure — Discovery — Order for — Anticipatory discovery — Jurisdiction of court — Whether order could be made in absence of pleadings

Civil Procedure — Injunction — Interlocutory injunction — Whether cause of action pleaded — Whether injunction could be issued in absence of pleadings

There was an agreement in writing between the appellant and the respondent containing an arbitration clause which selected Singapore as the forum. However an action was commenced against the respondent by a third party, in which the appellant applied to intervene. It had also terminated the agreement with the appellant. The respondent then applied to the High Court in Muar and obtained an injunction restraining the appellant from instituting arbitration proceedings in Singapore pursuant to the arbitration clause. The second part of the order required the appellant to make discovery. Hence this appeal by the appellant on both the issues.

Held, allowing the appeal with costs:

(1) The injunction should have not been granted because there were no pleadings against the appellant on which the injunction could issue. It is settled law that the right to obtain an interlocutory injunction is not a cause of action. There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained. Thus, the injunction must be set aside and dissolved (see para 3).

(2) Save in the circumstances set out in the case of *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, the court has no jurisdiction to grant anticipatory discovery. As such the order for discovery could not and ought not to have been made as there were no pleadings to warrant such an order (see para 5).

[Bahasa Malaysia summary

Terdapat satu perjanjian bertulis di antara perayu dan responden yang mengandungi klausa timbang tara yang memilih Singapura sebagai forumnya. Walau bagaimanapun, satu tindakan telah dimulakan terhadap responden oleh pihak ketiga, di mana perayu memohon untuk campur tangan. Ia juga telah menamatkan perjanjiannya dengan perayu. Responden kemudian memohon ke Mahkamah Tinggi di Muar dan memperoleh injunksi untuk menghalang perayu daripada memulakan prosiding timbang tara di Singapura menurut klausa timbang tara tersebut. Bahagian kedua perintah tersebut memerlukan perayu untuk membuat penzahiran. Maka rayuan ini oleh perayu atas kedua-dua isu tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Injunksi tersebut tidak sepatutnya diberikan kerana tidak ada pliding terhadap perayu yang boleh didasarkan untuk pemberian injunksi. Adalah undang-undang matan bahawa hak untuk memperoleh injunksi interlokutori bukan suatu kausa tindakan. Kausa tindakan mesti diplid seperti biasa sebelum injunksi interlokutori boleh dipohon dan diperoleh. Oleh itu, injunksi tersebut mesti diketepikan dan dibubarkan (lihat perenggan 3).

(2) Kecuali dalam hal keadaan yang disenaraikan di dalam kes *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, mahkamah tidak mempunyai bidang kuasa untuk memberikan penzahiran antisipasi. Oleh itu perintah untuk penzahiran tidak boleh dan tidak sepatutnya diberikan kerana tidak ada pliding untuk mewajarkan perintah sedemikian (lihat perenggan 5).]

Notes

For cases on interlocutory injunction, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 3224–3348.

For cases on order for discovery, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 2506–2509.

Cases referred to

Norwich Pharmacal Co v Customs and Excise Commissioners [1974] AC 133, HL (refd)

Siskina (Cargo Owners) v Distos Compania Naviera SA [1979] AC 210, HL (refd)

Appeal from: Civil Suit No 22–10–10 of 2007 (High Court, Muar)

Chang Tau Sian (Henry Soong & Chang) for the appellant.
Gan Techiong (Gan & Lim) for the respondent.

Gopal Sri Ram JCA (delivering judgment of the court):

[1] This is the judgment of the court.

[2] We are unanimous in holding that this appeal must be allowed. The short facts which form the background of this appeal are as follows. There is an agreement in writing between the appellant and the respondent. It contains an arbitration clause which selects Singapore as the forum. In 2007 two persons unconcerned with the contract between the appellant and respondent commenced proceedings against the respondent and one other. The appellant then took out an application to intervene in the action for the sole purpose of taking possession of the tunnel component constructed by the respondent for use in the construction of the mass rapid transport (MRT) in Singapore. The appellant deposited in court the purchase price of that component. Later, it terminated the agreement which it had with the appellant. Later still, it took out another application for leave to take possession from the respondent of further components of the tunnel segment. The respondent then applied to the High Court in Muar and obtained an injunction restraining the appellant from instituting arbitration proceedings in Singapore pursuant to the arbitration clause.

[3] In our judgment the injunction applied for should have not been granted because there was no pleading against the appellant on which the injunction could issue. It is settled law that the right to obtain an interlocutory injunction is not a cause of action. There must be a cause of action pleaded in the usual fashion before an interlocutory injunction may be applied for and obtained. We consider it unnecessary to do more than refer to the following passage in the speech of Lord Diplock in the *Siskina (Cargo Owners) v Distos Compania Naviera SA* [1979] AC 210, at p 256:

> … a right to obtain an interlocutory injunction is not a cause of action. It cannot stand on its own. It is dependent upon there being a pre-existing cause of action against the defendant arising out of an invasion, actual or threatened by him, of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court. The right to obtain an interlocutory injunction is merely ancillary and incidental to the pre-existing cause of action. It is granted to preserve the status quo pending the ascertainment by the court of the rights of the parties and the grant to the plaintiff of the relief to which his cause of action entitles him, which may or may not include a final injunction.

[4] For the reasons already given the injunction cannot stand. The order granting the injunction must be set aside and the injunction dissolved.

[5] Learned counsel for the respondent said that there is a second part of the order which requires the appellant to make discovery. Save in the circumstances set out in the decision of the House of Lords in *Norwich Pharmacal Co v Customs and Excise Commissioners* [1974] AC 133, the court has no jurisdiction to grant anticipatory discovery that is to say discovery in anticipation of the action being filed. We are therefore unable to agree with the learned judge that such an order ought to have been made on the facts of the instant case. It cannot and ought not to have been made. There was simply no pleading to warrant such an order. The same reasoning we have given earlier applies with equal force to this part of the judgment.

[6] It follows from what we have said thus far that the whole of the order dated 3 April 2008 cannot stand. It is set aside. The respondent must pay the appellant the costs of this appeal. The deposit in court shall be refunded to the appellant.

Delivered in open court at the conclusion of arguments on 22 July 2008.

Appeal allowed with costs.

Reported by M Sivabarathi